No. 16-1468

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT KERNAN,
Petitioner,

-v-

MICHAEL DANIEL CUERO,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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Pursuant to Rule 44, respondent Michael Daniel Cuero respectfully petitions for rehearing before the full Court.

On November 6, 2017, the Court issued a per curiam opinion granting certiorari and reversing the decision of the Ninth Circuit. In that opinion, the Court concluded the case was not moot because "[r]eversal would simply 'und[o]

what the habeas corpus court did,' namely, permit the state courts to determine in the first instance the lawfulness of a longer sentence not yet served." *Kernan v. Cuero*, 583 U.S. ___, *5 (2017) (citations omitted). While ordinarily this would be true, under the facts here it is not. At this point, Mr. Cuero has been resentenced, and that sentence is now final under state law. Accordingly, there is nothing left for the state courts to determine.

During the California state-court resentencing proceeding, Mr. Cuero reentered his guilty plea to the original charges. *See* Res. App. a1-a5. That plea resulted in a statutory maximum sentencing exposure of 14 years and 4 months, and he received a lawful sentence of 13 years and 4 months. The state did not appeal. The sentence, therefore, is now immutable. As the California Supreme Court held in *People v. Karaman*, 4 Cal. 4th 335, 350 (1992), "a valid sentence may not be *increased* after formal entry in the minutes." (Emphasis in original). Accordingly, under no circumstance can Mr. Cuero's sentence revert to the indeterminate 25-to-life sentence he was previously serving.

To play it out, assume purely for argument's sake that on remand from this Court, the Ninth Circuit affirms the District Court's denial of Mr. Cuero's petition

for federal habeas relief.[1] The prior sentence *cannot* be reinstated because the plea and conviction authorizing an indeterminate life sentence no longer exists. Instead, a new final judgment is in place. And the state has no procedural avenue for undoing it. It chose not to appeal the sentence. Moreover, there is no statute authorizing post-*sentencing*, as opposed to post-*plea*, amendments to charging documents. Indeed, California Penal Code § 969.5(a), upon which the state has relied, is limited to "pending complaint[s]."

Tellingly, petitioner cites no statute or court rule establishing that the state court has the authority to reinstitute the prior sentence. Instead, it contends generally, "California courts are authorized to set aside any criminal judgment that is void on the face of the record." Pet. Reply. 4, n.4. But there is nothing void on the face of Mr. Cuero's now final sentence. And the case upon which petitioner relies – *People v. Amaya*, 239 Cal. App. 4th 379, 386 (2015) – proves the point.

In *Amaya*, the defendant was initially resentenced to a lesser term based on a change in the law. *See ibid.* However, as a matter of law, he was not eligible

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1 Mr. Cuero's ineffective assistance of counsel claims have not been decided by the Ninth Circuit and thus present a potential alternative basis for granting the writ. Pet. App. 6a, n.4 ("Cuero properly exhausted on direct and collateral review his claims that the prosecutor breached the plea agreement in violation of his due process rights and that he received ineffective assistance of counsel. We do not reach the latter claim.")

for such resentencing. *See ibid.* Once the prosecution realized the mistake, the "[d]efendant was hauled back into court and re-resentenced to 25 years to life." *Id.* at 381. The California Court of Appeal affirmed, explaining the initial resentencing had "granted relief that the court had no power to grant." *Id.* at 386. Thus, it was "void on the face of the record." *Ibid.* Because the court "'exceeded its jurisdiction in granting relief which [it] had no power to grant,'" that relief could be undone. *Ibid.* (citation omitted).

Here, however, the state court did not act beyond its jurisdiction in granting relief. To the contrary, the 13 year and 4 months sentence was within the court's authority and entirely lawful. On this issue, there is no dispute. Thus, the judgment is not void on its face, and it cannot be unwound. The case, therefore, is moot. *See St. Pierre v. United States*, 319 U.S. 41, 42-43 (1943) (the matter was moot because "[t]he sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done[.]").

Nor do the decisions cited in the Court's per curiam opinion lead to a contrary conclusion.

In *Mancusi v. Stubbs*, 408 U.S. 204, 205-06 (1972), New York State sentenced respondent as a second offender, based on a felony conviction in

Tennessee. Respondent's petition for federal habeas relief was granted by the Court of Appeals, which concluded that the Tennessee conviction was unconstitutional. *Ibid.* New York State then resentenced respondent to the same sentence, based upon another predicate conviction in Texas. *Ibid.*

That resentencing, however, did not moot the case because the respondent's appeal involving the validity of the Texas conviction was being actively litigated in the New York courts. *Id.* at 206-07. New York State, therefore, had a continuing interest in the availability of the Tennessee conviction as a predicate for the stiffer punishment. *Ibid.* If the Texas conviction ultimately could not be used, respondent would be entitled to a lesser sentence from the New York court, unless the Tennessee conviction again became available based on reversal of the habeas grant. Accordingly, it could not "be said with certainty that the New York courts may validly resentence respondent to the same term." *Id.* at 206. And because the sentence could change, the case was still live.

Here, however, Mr. Cuero's sentence cannot change. There are no other convictions being litigated or state appeals pending. There is nothing left but the certainty of the currently imposed California sentence of 13 years and 4 months. Thus, unlike *Stubbs*, this case is moot.

The Court's decision in *Eagles v. United States*, 329 U.S. 304, 308 (1946), is equally inapposite. That matter was not moot despite the respondent's release from military custody because reversal would, under the circumstances, "make[] lawful a resumption of the custody." *Ibid.* The analogy here would be if reversal allowed the California courts to reimpose the 25-to-life sentence. As discussed, however, it will not. The state has identified no method of vacating the now final judgment because none exists.

Accordingly, Mr. Cuero respectfully requests the Court grant rehearing and deny the petition for certiorari as moot. In the alternative, the Court should withdraw the per curiam opinion and place the case on the merits docket.

Respectfully submitted,

Dated: November 15, 2017

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Certificate of Counsel

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

DEVIN BURSTEIN

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PROOF OF SERVICE

I, Devin J. Burstein, hereby certify that all parties required to be served with the petition for rehearing filed herewith have been served as follows:

In accordance with Supreme Court Rule 29.2, I caused the original and ten (10) copies of these documents to be delivered to Clerk, Supreme Court of the United States, Washington, D.C., 20543, on November 15, 2017; and on the same date I: caused one (1) copy of these documents to be delivered to counsel of record for the Attorney General of California, 600 West Broadway, Ste 1800, San Diego Ca., 92101.

DEVIN J. BURSTEIN